C.A. NO. 06-99002
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL ANGELO MORALES, Petitioner-Appellant, v. RODERICK Q. HICKMAN, Secretary of the California Department of Corrections; STEVEN ORNOSKI, Warden, San Quentin State Prison, San Quentin, CA; and DOES 1-50, Respondents-Appellees.	D.C. Nos. C 06 0219 (JF), C 06 0926 (JF) **DEATH PENALTY CASE** **EXECUTION IMMINENT: Execution Date February 21, 2006**

APPELLANT'S PETITION FOR REHEARING AND REQUEST FOR REHEARING EN BANC AND STAY OF EXECUTION

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PETITION FOR REHEARING OR REHEARING EN BANC

Petitioner-Appellant Michael Morales petitions this Honorable Court for rehearing or rehearing en banc based on the following facts:

Mr. Morales brought a timely challenge under 42 U.S.C. § 1983 to the State of California's lethal injection procedure that was going to be employed to execute him. On February 18, 2006, a panel of this Court affirmed the denial of a preliminary injunction and the denial of a stay of execution by the District Court.

The proceeding now before this Court involves questions of exceptional importance because the District Court below and this Circuit are, apparently, the only courts to deny an evidentiary hearing to a timely, well-supported challenge to lethal injection procedures. They did this with last-minute changes that, essentially, created a new protocol.

None of these modifications have ever been vetted in any manner, they have never been tested in a court, reviewed medically, or considered administratively. They are based on two glaring, faulty premises: that Procedure 770's flaws do not affect administration of the sedative so that the initial, medically inappropriate processes can remain unaltered; and that a doctor can quickly re-sedate an inmate once the pancuronium (or potassium) is injected into an inadequately sedated inmate, thereby protecting him at the end-stage.

As noted in his Motion for Stay of Execution, by Dr. Heath, and by the District Court, there is a real danger of the appearance of sedation, even to a trained anesthesiologist, and the realization once the pancuronium hits (only by a highly trained eye) that the inmate is not properly sedated. ER 314. This is exactly why this drug is not used in animal euthanasia or in end-of-life decisions. It is what happened to Mr. Babbit, Mr. Anderson, Mr. Rich and possibly others who were breathing. When this occurs in hospitals, corrective action can easily be taken because it is not a lethal dose. But, here, re-sedation is likely to be useless unless vast changes are made in the protocol, particularly in its delivery system. The same is true for the potassium chloride stage. Mr. Morales has never had his day in court to demonstrate that these quick fixes will not, and cannot work. This is what happens when courts decide complicated medical issues without any input from counsel or medical experts because of a need to maintain an execution date.

The United States Court of Appeals for the Eighth Circuit, when confronted with a very similar set of circumstances, voted 9-1 *en banc* to stay a Missouri execution and to allow for further briefing by the parties and judicial consideration on the merits, after the district court had provided the parties with a very truncated lower court proceeding, but one at which at least some testimony was taken, and after the panel approved. ER 236 *Taylor v. Crawford,* No. 06-1397 (8th Cir. 2006).

The situation here is even more compelling, as no court in the nation has ever been presented with the evidence that was before the District Court and the panel in this case. Even the limited record here provides disturbing evidence that the lethal injection procedure in California is not working properly. The evidence continues to grow, as more difficulties arise and more information about executions becomes known. We are now, finally, at the point where at the very least a hearing with discovery and witnesses needs to be held.

The evidentiary proceeding mandated by the facts never took place. And yet again, the Department of Corrections and Rehabilitation has escaped the glare of scrutiny into its procedures and avoided questioning about the constitutionality of its legal injection procedure. The panel's attempt will fare no better because a court simply cannot fashion this type of remedy without even asking the parties if it will work, much less having it reviewed and considered *according to the evidence.*

Accordingly, Mr. Morales respectfully requests that this Court grant his petition for rehearing or request for rehearing en banc, to enter a stay of execution, and the matter be remanded for full discovery and a hearing on the merits of the complaint.

NATURE OF THE CASE

In 1983, Mr. Morales was convicted of first degree murder and sentenced to death. After his appeals were exhausted Mr. Morales exhausted his criminal appeals and unsuccessfully pursued a writ of habeas corpus, an execution date of February 21 was set. Because of state laws, Mr. Morales filed this action in the District Court only 39 days before his scheduled execution. After five rounds of briefing and two oral proceedings, the District Court, with only five days remaining before the execution date, held that Mr. Morales had established that there existed substantial questions about California's lethal injection process, but announced there would be no evidentiary proceeding or discovery beyond the limited materials provided earlier because the State had agreed to have two anesthesiologists monitor Mr. Morales during the execution to determine consciousness. Mr. Morales was left with only a few hours to respond to the Court's implementation of a procedure that heretofore had never been employed in the California protocol (or anywhere else, for that matter). Although Mr. Morales pointed out several problems with this late-in-the-day procedure that was devoid of any description of what the monitors were going to do or how, and highlighted admissions by the State that the monitors were going to merely observe the procedure, the District Court nonetheless refused to stay the execution to allow for

review of this new plan. When these flaws were noted to the panel, it adopted yet another procedure without any input from the parties as to whether it will correct known deficiencies.

ISSUES

1. Whether the District Court can refuse to stay an execution or hold an evidentiary proceeding despite its finding a substantial risk that Mr. Morales will not be properly sedated during his execution, and a finding that the State of California needs to address and repair its protocol, but without determining either a likelihood of success or balancing the harms to the respective parties from its inaction.

2. Whether the District Court, aided by a panel of this Court, can fashion a last-minute remedy in the face of this evidence, without any expert consideration or administrative or adversarial review, and without determining what the remedy will entail, how it will be implemented or whether it will be effective.

3. Whether a District Court and the panel can refuse to stay proceedings, thereby preventing review of the newly-implemented and vague remedy in the face of evidence that the remedy will not be effective to protect Mr. Morales' rights to a humane execution.

ARGUMENT

DESPITE COMPELLING EVIDENCE THAT CALIFORNIA'S LETHAL INJECTION PROTOCOL CREATES A SUBSTANTIAL RISK THAT MR. MORALES WILL SUFFER PAIN DURING EXECUTION, THE DISTRICT COURT REFUSED TO PROVIDE MEANINGFUL RELIEF.

The District Court's finding of a substantial risk that Mr. Morales would suffer unnecessary pain during his execution mandated that the Court stay the execution and conduct a judicial review through an evidentiary hearing into that process. Such a course of action was undeniable given the presentation of evidence establishing a grossly defective procedure, untrained personnel and numerous incidents of executed inmates not being adequately sedated. There is no doubt the evidence established a sufficient likelihood of success on the merits to warrant an injunction that would allow discovery and a hearing.

After 33 days, and five rounds of requested briefing with two oral proceedings, and only five days prior to the scheduled execution, the District Court announced a plan concocted by itself alone, giving Mr. Morales a few hours to respond. Instead of a hearing as to the procedure in place, the Court created a new plan under which Appellees would have two anesthesiologists attend Mr. Morales' execution to monitor his level of unconsciousness. Mr. Morales immediately requested a stay and a hearing to review this new plan because it was issued only days before the execution and said nothing about what these doctors were going to do or how. From all appearances, the new plan conflicted with Procedure No. 770,

but retained all of that procedure's myriad flaws. This fact was confirmed only hours afterwards when Appellees made clear in their filing and in their official statements that the doctors would be present only to monitor Mr. Morales, and otherwise the process under Procedure No. 770 would remain unchanged. That process contains no mechanism for medical intervention, and there are no back-up sedatives available should the monitors observe inadequate sedation.

Four days prior to the execution, the District Court denied the stay request by interpreting Appellee's position to be consistent with the Court's intended plan, construing "monitor" to mean "insure adequate sedation" and presuming those monitors would be able to interceded in a medically appropriate manner. It did not order Appellees to make sure that the monitors had this capability and Appellees have never stated they would, even in this Court. Neither Appellees nor the District Court have explained how the new monitors will be incorporated into the new protocol, leaving a high level of uncertainty and an even greater opportunity for mistakes than before.

The panel here attempted to fix these problems by construing the orders still further to mean that the doctors could return Mr. Morales to a level of sedation and would have the supplies necessary. Op., at 13. Yet, no one has answered the point raised in the briefing seeking a stay of execution --- once the pancuronium hits Mr. Morales and inadequate sedation is realized, which the District Court recognized as

a real potentiality given at least 3 prior instances wherein this occurred, *it is likely too late*. If there had been any evidentiary proceedings on these last-minute fixes, Mr. Morales could have made this clear.

There are still further problems unaddressed by either court. There are a number of specific issues that the CDCR will need to address in planning to carry out Mr. Morales's execution in accordance with the court's order. Two new actors -- the anesthesiologists -- must be integrated into the execution procedure. The already-existing execution team, composed of untrained personnel, must have a means of interacting with the newly added doctors. For the first time ever, a member of the team will be present in the execution chamber -- which is sealed and locked -- with the inmate. A method of communication must be developed between this sealed and locked chamber and the anteroom from which the rest of the team injects the drugs. A method of stopping the execution should the doctor find that Mr. Morales is conscious must be developed and tested for effectiveness. These are only a few examples of the procedures that the CDCR must create.

Thus, to implement the court's remedy the CDCR must come up with a new protocol that addresses issues never before confronted by the CDCR. All of these new issues must be described in the new protocol and step-by-step instructions developed. Even as deficient as Procedure No 770 is, it recognizes the need to give detailed instructions for preparing and injecting the drugs and for detailing the

roles that the untrained personnel will play. With literally hours before Mr. Morales' execution, the State must now develop a procedure that implements the Courts' remedies and defines the roles of all personnel. Neither the State, nor the Court, nor Mr. Morales know what that new protocol will look like and whether it will be adequate. But given that the State has already come up with one deficient protocol, Mr. Morales surely should be entitled to litigate whether the new protocol is adequate, but that opportunity has been denied because no one even knows what that protocol will be.

And why the panel or any other court would assume that Appellees would be able to devise a satisfactory protocol now, when they have failed to do so for the past four years, is never explained. Thus, in additiona to the fundamental misconception concerning re-sedation, having anesthesiologists participate in the execution may in the abstract ensure a humane execution. But, we don't know because there is no protocol to examine. And, "medically appropriate" means fixing all the problems that have resulted in inadequate sedation, not just the few at the end stage. In fact, it is highly likely that the new protocol, developed at the last minute with only days before Mr. Morales's execution, without time to consult with experts, will fail to ensure that the doctors' participation will be meaningful.

In many ways, this case is even more egregious than *Taylor*. In that case, the State of Missouri prevented considered review of a very similar claim through

its execution-setting mechanism, forcing last-minute litigation, the same device it had used previously for several other litigants. *See* ER 306-07 n. 3; 458-60; ER 466-68 (description of *Taylor* case). Here, the State of California's actions have the same effect. *See Beardslee v. Woodford*, 395 F.3d 1064, 1069 n. 16 (9th Cir. 2005)(ripeness at time of execution choice); Cal. Pen. Code sec. 3604 (state choice provision); Cal. Pen. Code sec. 1193(a) (state decides requested date for execution); Cal. Code Regs., tit. 15, sec 3349(a) (choice made only after date set, which is usually 30 days); Cal. Code Regs., tit. 15 sec. 3084.3(c) (late administrative review procedure). Undoubtedly, the Eighth Circuit was concerned with proceedings that do not allow for appropriate review of a claim that a lethal injection procedure presents a substantial risk of unnecessary pain. Its action was upheld 6-3 in the Supreme Court. *Crawford v. Taylor*, 546 U.S. ___ , No. 05A705 (Feb. 1, 2006).

In *Taylor*, however, the district court had at least given plaintiff an opportunity to call some witnesses. This included the cross-examination of Dr. Dershwitz, the transcript of which was not available until after the District Court's final order. In Mr. Morales' case, the Court permitted no examination of any witnesses, despite the requests of Mr. Morales to do so. Mr. Taylor received five days to present evidence while Mr. Morales' attempt for 33 days to obtain a hearing on Procedure No. 770 was futile. Then, Mr. Morales was given less than a

day to digest, analyze and address the District Court's new plan. Now, he as but a few hours to consider the panel's further modifications.

As a result, California remains one of the few states for which there has never been any proper judicial review of its lethal injection protocol once a timely challenge is made. *See Abdur'Rahman v. Bredesen*, ___ S.W.3d ___, No. M2003-01767-SC-R11-CV, 2005 WL 2615801 (Tenn. Oct. 17, 2005); *Reid v. Johnson*, 333 F. Supp. 2d 543 (E.D. Va. 2004); *State v. Webb*, 750 A.2d 448, 453-57 (Conn. 2000). Ironically (or, tragically), California is the only state that has a developed record of error, a point noted by the District Court. ER 308

The District Court and the panel ignore what Mr. Morales pled and contended, which neither can do. *Zepeda v. I.N.S.*, 753 F.2d 719, 724 (9th Cir. 1984) (reversal if court applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion). Mr. Morales has always insisted that Procedure No. 770 was so rife with error in the selection and administration of the drugs, and has resulted in numerous inadequately sedated inmates during executions, that there is a substantial risk of an unnecessarily painful execution. ER 13-24. This risk was *compounded* by the lack of both verification and monitoring. ER 17. Attempts to address monitoring without changing the procedure would not present a medically appropriate solution. This would have

been plain had the District Court or the panel allowed more than a few hours of review.

One need only look at precisely what Dr. Heath presented this error. Dr. Heath conducted a painstaking medical review of Procedure No. 770 and found numerous deficiencies in nearly every aspect of the process that do not comport with standard medical procedures: drug preparation, labeling, equipment used, remote injection, the lengthy IV tubing, insertion of the catheter, leakage, excessive pressure, improper restraints, a jury-rigged line with a modified diaphragm, no standardized time frame for drug administration, no training or qualifications, and the use of a paralytic agent that was rejected for animal euthanasia and for end-of-life decisions in hospitals because of its risk of masking error in a painful and grotesque manner. ER 84-102; ER 186-88. Although inadequate monitoring of unconsciousness, the lack of backup sedative, and no procedures to stop the process if problems arise were certainly noted, those end points in the process were by no means the only difficulties.

Dr. Heath's analysis was not a hypothetical or academic exercise, but was informed by numerous compelling instances of error in California that are undeniable at this point. ER 95, 99-100; ER 182-88; ER 242-45. This is supported by Dr. Heath's review of over 200 toxicological reports of executions. ER 248-49. Appellees do not even contest most of them, and the counter offer they made to

explain post-sedation breathing was completely unscientific and was rejected by the District Court. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); ER 311. Thus, this list of inadequate medical procedures now includes inadequate record-keeping and lack explanations for numerous difficulties and deviations. ER 95, 99-100; ER 182-88; ER 245-46. And, it includes an absolute failure to review the procedures once those errors became apparent. ER 242. This is a deliberate indifference to the harm that itself requires relief. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). In short, Mr. Morales and Dr. Heath have established that the medically appropriate manner of insuring sedation would require that the process in its entirety be reviewed and changed in numerous ways so as to comport with standard medical procedure.

Because the District Court waited until the eleventh hour to announce its "cure" for the protocol, and the panel grafted still further procedures onto the process, none of this could be explained or presented. Nor was Mr. Morales allowed to discover and develop further the instances of error so as to prove the substantial risk of unnecessary pain. Instead, the working assumption is that there is no problem, or the problem is so self-contained that mere provisions for last-minute sedation are sufficient. That assumption can no longer carry the day. At the very least, it requires a hearing and presentation of evidence.

More fundamentally, the notion that Dr. Heath offered a cure-all fix to the Court for the defective protocol is pure fancy, as neither Dr. Heath nor Mr. Morales has ever presumed to undertake to develop a new, humane protocol for the State of California. If it were true that the District Court or the panel were following Dr. Heath's recommendations, and if it were true that meant a medically appropriate method of insuring sedation, then it would require a change in the IV process, the labeling of the syringes, the delivery of drugs, which drugs to use, and all the other medically-deficient features which result in inadequate sedation. Obviously, none of this is going to occur as the result of the District Court's two-day review and the latest modification by the panel. And, it shouldn't because that is the state's province as the District Court itself noted and counsel for Mr. Morales agreed. ER 479; ER 482. This Court has explained exactly why that is. *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 877-78 (9th Cir. 2002). The District Court and the panel should have stayed the execution, held the hearing, and requested the state review and revise its protocol to address any deficiencies through the normal administrative procedures already in place. *See* Cal. Gov. Code § 11349 et seq. (Administrative Procedure Act hearing and comment); 15 Cal. Code Regs. § 3380(c) & (d) (limiting written approval to Wardens, subject to approval by the Director); ER 30 (Procedure No. 770 section IV requiring Warden and Director approval). Once that was accomplished, then it

could be brought to the District Court and orderly review conducted. Indeed, this is exactly what the Prison Litigation Reform Act contemplates in its deference to state decision-making. *See* 18 U.S.C. sec. 3626(a)(1)(B) & (2); *Nelson v. Campbell*, 541 U.S. 637, 650 (2004).

Even if the District Court or panel could bypass these established state procedures, its hastily-devised plan was in error. Our system of justice is founded upon the adversarial testing of argument and evidence. *U.S. v. Shaffer Equipment Co.*, 11 F.3d 450, 457 (4th Dist. 1993) (noting that our adversary system "depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions"). Neither a District Court nor a panel can reach out and fine tune state regulations without some adversarial process that allows considered input and review. To do so violates the Due Process rights of the litigants before it. *See State of California ex rel. Lockyer v. F.E.R.C.*, 329 F.3d 700, 708 n.6, *quoting Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). A few hours of review are simply not enough.

Courts are allowed to make decisions in a considered and timely manner, regardless of the swirling public debate. *See* ER 303-304 (court's discussion of media perception of the case); U.S. Const., Art. III; *See Bell v. Hood*, 327 U.S. 678, 684 (1946); *Marbury v. Madison*, 5 U.S. 137, 163 (1803). There are numerous statutory and equitable provisions that maintain the status quo so as to

permit this. *See* Fed. R. Civ. P. 65 (injunctions and restraining orders); 18 U.S.C. sec. 3626(a) (PLRA). There are established standards that require the balancing of the likelihood of success with the resulting harm to the litigants if an injunction is either permitted or denied. *Beardslee v. Woodford*, 395 F.3d 1064, 1067-68 (9th Cir. 2005).

The District Court here declined all of these mechanisms, and seizing upon a selective reading of Mr. Morales' papers, adopted a quick-fix so late in the day that no review or considered input was possible. *See Pac. West Cable Co. v. City of Sacramento*, 798 F.2d 353, 354 (9th Cir. 1986) (abuse of discretion in not applying correct law); *Zepeda v. I.N.S*., supra, 753 F.2d at 724 (misapplication of the law). Even then, Mr. Morales was able to demonstrate that the plan had gone awry less than an hour after it was announced as the official spokesperson for the entire Department announced there would only be monitoring (ER 327), a position echoed by its Chief Counsel in papers submitted to the District Court that Mr. Morales never was able to comment upon (ER 335). The District Court's response was to construe it as permitting more, even though Procedure 770 does not allow it. *See e.g.* ER 56, 66, 502-504 (no back-up sedative).[1] This was clearly

[1] Although rendered moot by the panel's modifications, the state's brief is not evidence and it was untrue that any backup sedative is available. A review of the citation offered (ER 503-504) establishes this.

erroneous. *Pac. West Cable Co. v. City of Sacramento*, supra, 798 F.2d at 354 (abuse of discretion for clearly erroneous findings of fact).

The District Court and the panel never addressed the harm to Mr. Morales – which is obvious as he will likely die in a painful, excruciating manner but be unable to utter or register a complaint. The State of California has used advances in medicine not to make the process humane, but to chemically mask its failings. Now, his drug-induced silence will be joined by a doctor who, may in theory have the authority and ability to relieve his pain, but how is uncertain. What is clear, though, is that once the pancuronium hits, it is highly unlikely that anything will be able to save Mr. Morales from this awful fate.

Mr. Morales has made a sufficient showing so as to allow him his day in court. There are "substantial grounds upon which relief might be granted", *Barefoot v. Estelle*, 463 U. S. 880, 885 (1983), and a necessity for review, *Martinez-Villareal v. Stewart*, 118 F.3d 625, 626 (9th Cir. 1997).

CONCLUSION

For the foregoing reasons, rehearing or en banc review is required, and a stay of execution issued.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 40-1(a), I hereby certify that the attached Petition for Rehearing and Request for Rehearing En Banc is produced in a proportional font (Times New Roman) of 14 point type and utilizes double line spacing, except in footnotes and extended quotations which are single-spaced. I further certify that, according to the word count of the word processing system used to prepare the brief, the brief includes 3,991 words in total.

Dated: February 19, 2006

JOHN R. GRELE

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